

Supreme Court, U. S.

FILED

FEB 14 1977

MICHAEL PODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 76-983

October Term, 1976

EUGENE GOSPER,

*Petitioner,*

*vs.*

E. R. FANCHER and THE BROTHERHOOD OF  
LOCOMOTIVE FIREMEN & ENGINEMEN,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT  
OF CERTIORARI TO THE COURT OF APPEALS  
OF THE STATE OF NEW YORK**

**Opinions Below**

The opinion of the New York Court of Appeals is reported at 40 NY 2d 867 (1976), affirming the opinion of the New York Appellate Division reported at 49 App. Div 2d 674.

The opinion of the New York Court of Appeals 40 NY 2d 867 (1976) is reprinted in the Appendix at page 1a through 2a. The Opinion of the New York Appellate Division, 49 App. Div. 2d 674 is reprinted in the Appendix at page 3a through 4a.

### **Jurisdiction**

The judgment of the New York Court of Appeals was dated October 22, 1976. The Petitioner invokes the jurisdiction of this Court under Title 28, Section 1257 (3) or 1254 (i) of the United States Code.

### **Questions Presented**

1. Did the New York Court of Appeals err in affirming an order of the New York Appellate Division which held that "upon the trial the jury was erroneously charged that the difference between plaintiff's prior fireman's income and his reduced income after termination was a proper measure of damages and that the union could only be liable for loss of employment damages "to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer?"

2. Does the New York Civil Practice Law and Rules, Section 5601 (c), which allows an appeal to be taken to New York's highest Court, the Court of Appeals, from an order of the Appellate Division granting or affirming the granting of a new trial or hearing only where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him, raise a substantial federal law question?

### **Constitutional Provisions Involved**

U. S. Constitution, Amendment VII.

### **Statutes Involved**

Railway Labor Act 45 USC, Sections 151a, 152, 153; NY CPLR No. 5601 (c).

### **Statement of Case**

The petitioner, EUGENE GOSPER, was formerly employed by the Erie Lackawanna Railway Company (EL) as a locomotive fireman. He began his employment on or about May 22nd, 1956 with the Delaware Lackawanna and Western Railroad (DLW). In 1960 the Erie Railroad (E) and the D.L.W. merged. Petitioner was continued in the employ of the newly formed E.L. Railroads despite a prior dismissal from the E Railroad for alleged falsification of his employment application and failure to disclose relevant medical information. Petitioner was a fireman and joined the Brotherhood of Locomotive Firemen and Enginemen (B.L.F.E.). He continued working on the EL until February 26, 1965 at which time he was removed from service pending determination of his responsibility for a train wreck which occurred on February 26, 1965.

On May 6th, 1965, petitioner appeared at a disciplinary investigation to answer company charges that he falsified his employment application by concealing prior physical injuries. Petitioner was represented by a local union official of the BLFE and his attorney. On June 7, 1965, petitioner was found to be in violation of company rules and dismissed from the service of the EL.

Prior to his June 7, 1965 discharge, petitioner was also charged with violation of various company operating rules for his involvement in the train wreck of February 26, 1965. A disciplinary hearing was held on May 27, 1965. Petitioner was represented by Respondent General Chairman Fancher of the BLFE. Petitioner, acting on the advise of his lawyer, who was also representing petitioner in his pending F.E.L.A. claim, which had resulted from the February 26th accident, refused to answer any questions concerning the accident. Petitioner was dismissed from service a second time.



Petitioner notified his local chairman of the BLFE and instituted a grievance under Section 33 (3) of the collective bargaining contract. Petitioner alleged that his discharge was in violation of the contract and therefore sought reinstatement. The request was denied by the EL. The local chairman contacted the general chairman and the attorney and advised them of the denial. He then requested the appeal to be handled to the next step.

The general chairman did not progress the appeal because he felt that it lacked merit and that the proper steps under the union constitution and by-laws had not been taken. The attorney did not progress an appeal and failed in settling petitioner's F.E.L.A. case to secure petitioner's job back. Prior to his retirement in 1967, the general chairman had not advised petitioner that the grievance was not progressed. In 1968, petitioner was informed by the new general chairman that the grievance had not been progressed.

On June 19, 1968, petitioner sued the respondents herein for \$296,000.00 in damages for their alleged failure to progress the grievance in an effort to secure his job back, to regain his lost wages and to remove all discipline from his employment record.

The petitioner did not sue the EL Railroad. A jury trial was held. A judgment against the respondents in the amount of \$40,000.00 was awarded petitioner. The respondents appealed the jury finding of unfair representation and the award of money damages against the union as being contrary to the law. The Appellate Division of the State of New York affirmed as to liability but reversed and ordered a new trial as to damages. The petitioner did not seek a new trial but appealed to the New York State Court of Appeals, seeking to set aside the Appellate Division decision on damages and seeking

affirmation of the jury award. In order to proceed directly to the Court of Appeals, the petitioner was required to stipulate under New York CPLR 5601 (c) that should the Court of Appeals uphold the Appellate Division on the issue of damages, that judgment absolute would be entered against him. The respondents cross-appealed to set aside the Appellate Division's affirmance of liability against the respondents for unfair representation and to seek affirmance of the Appellate Division ruling on damages.

The Court of Appeals affirmed as to the Appellate Division's holding on damages. In addition, the Court of Appeals cited this Court's recent ruling in *Hines v. Anchor Motor Freight*, 424 US 554, 96 S Ct. 1048 to "reinforce the conclusion that damages for wrongful discharge could have been sought against the employer in this case. The Court further denied petitioner's application to be relieved of his stipulation for judgment absolute in the event of affirmance. The Court dismissed respondent's appeal on the ground that it did not lie.

Petitioner now seeks a Writ of Certiorari to the Court of Appeals of the State of New York from this Court; Respondents appear in opposition to the granting of the writ.

## ARGUMENT

**I. The Petition does not raise any substantial or important questions of Federal Labor Law nor does it raise any valid conflict of decision between the law as applied by the New York Courts and the Federal Court.**

This Court has dealt exhaustively with the question of an employer's alleged breach of collective bargaining contract and the union's alleged violation of its duty of unfair representation. This line of cases originated with the *Steele v.*

*Louisville & M.R.R.*, 323 US 192 decision and developed into the *Vaca v. Sipes*, 386 US 171 and *Glover v. St. Louis S.F.R. Co.*, 393 US 324. The two questions posed by petitioner have been thoroughly covered in these earlier cases and most recently in the Court's recent decisions in *Andrews v. Louisville & Nashville Railroad Corp.*, 406 US 320 (1972) and *Hines v. Anchor Motor Freight*, 424 US 554 (1976). Although petitioner attempts to raise "new issues", his case is no more than a breach of contract—unfair representation case. He raises no Federal labor law questions which have not previously been answered by this Court. Petitioner is merely "window dressing" in an attempt to get around his failure to sue the employer. The questions that he proposes have been thoroughly dealt with in the *Vaca* line of cases.

Petitioner had a right to sue his employer and he did not. Although petitioner proceeded under a *Vaca* theory of unfair representation and cited *Vaca* in his initial trial memorandum, he failed to join the employer, even though *Vaca* succinctly stated, at 17 L Ed 2d 962:

"A more difficult question is what portion of the employees damages may be charged to the union, in particular, may an award against a union include as it did here, damages attributable solely to the employer's breach of contract? We think not. Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, it may be (*and probably should be*) joined as a defendant in the fair representation suit." (emphasis ours).

This Court made it clear in *Vaca* and *Glover*, that an exhaustion of remedies argument would not suffice to let an

employer off the hook for breach of contract where the union, as petitioner alleged in his lawsuit, unfairly represented the grievant. This Court also made it clear that the employer should be joined in the suit. *Czosek v. O'Mara* at 397 US 29, in accord with *Vaca* states:

"damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance added to the difficulty and expense of collecting from the employer."

Petitioner had a chance to try this issue of damages against the union but waived it, in favor of an appeal to the New York Court of Appeals, on the same damages issue that he lost in the Appellate Division.

Petitioner argues that his case was not one of wrongful discharge against the employer but one against the union for failing to secure his restoration. Without the initial discharge and without the collective bargaining contract providing for job security, there would be no role for the union to play and no basis for seeking job restoration. This Court dealt with an attempt to treat a discharge as something other than a breach of contract claim in the *Andrews v. Louisville & Nashville Railroad Co.*, 406 US 320 and stated that:

"it is conceded by all that the only source of petitioner right not to be discharged and therefore to treat an alleged discharge as a 'wrongful' one that entitles him to damages, is the collective bargaining agreement."

It is quite apparent that petitioner's complaint was primarily, with the employer for discharging him and secondarily, with the union for its alleged failure to grieve his case. Petitioner had the right and obligation to sue his employer, if he intended to seek damages for his discharge. Petitioner never lost this right against the employer. He never had the



right to seek damages against the union alone for the independent affirmative acts of his employer, which resulted in his discharge. In *Hines v. Anchor Motor Freight*, 424 US 554, this Court held that a lawsuit for damages for wrongful discharge against the employer will lie, in spite of a defense based on exhaustion of remedies, where the employee can prove an erroneous discharge and the union's breach of its duty of fair representation.

The New York Courts in applying Federal Labor Law did not leave petitioner without a remedy. It was his own failure to sue his employer for breach of the collective bargaining contract that resulted in an adverse decision on damages. Even if the union violated its duty of fair representation, a money damages award against the union alone where it was the employer's action and not the union's that triggered the controversy, could not stand. The initial damages awarded at trial were not in accord with the Federal Labor Law standards enunciated by this Court and the Appellate Division and the Court of Appeals of the State of New York therefore properly reversed the judgment.

**II. The Petition does not raise any important question of Federal Substantive Law which conflicts with State Procedural Law.**

The Legislature of the State of New York in enacting section 5601 (c) of the Civil Practice Law and Rules has seen fit to require an appellant in any action which originated in the Supreme Court who seeks to appeal an order of the Appellate Division granting or affirming the granting of a new trial or hearing, to stipulate that upon affirmance, judgment absolute shall be entered against him.

The petitioner-appellant was granted a new trial in State Supreme Court by the New York State Appellate Division. The Appellate Division granted appellant the right to determine the proper amount of damages lawfully chargeable against the union for violation of its duty of fair representation.

The Appellate Division cited the controlling federal substantive law for determining damages against the union as enunciated in the *Vaca* line of cases. The Appellate Division ruled that the trial judge had erred in his charge to the jury concerning the proper amount of damages which could be charged to the union as a result of its breach of the duty of fair representation. Petitioner freely chose not to proceed to a new trial on the issue of damages as spelled out in the decision of the Appellate Division. Petitioner chose instead to re-argue his position on damages to the Court of Appeals. In order to proceed to the Court of Appeals, rather than to trial, petitioner freely stipulated that if the Court of Appeals should affirm the Appellate Division, then judgment absolute would be entered against the petitioner. Petitioner's application to be relieved of his stipulation for judgment absolute in the event of affirmance was denied by the Court of Appeals.

Petitioner cites no authority for his novel argument presented to this Court. In effect, petitioner seeks to have this Court set aside legislation of the New York State Legislature which seeks to conserve judicial energies by allowing an appellant a choice of either a new trial or an appeal, but not both. This statutory procedural requirement is not repugnant to federal law. CPLR 5601 (c) merely reflects an attempt on the part of the New York Legislature to implement and enforce judicious procedures to be followed by the attorneys

and the Courts of the State of New York. This State procedural requirement does not raise any important questions of federal law, nor is it violative of the guarantees of the Seventh Amendment.

### **Conclusion**

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari should be denied.

Respectfully submitted,

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